FEB 16 1995

No. 94-1227

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

KIM VERRICHIA, et al.,
Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE, et al.,
Respondents

On Petition for Certiorari to
the Commonwealth Court of Pennsylvania

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
QUESTION PRESENTED FOR REVIEW. . . .	1
LIST OF PARTIES.	2
STATEMENT OF THE CASE.	3
REASONS FOR DENYING THE WRIT	7
The case presents no important issues	7
CONCLUSION	12

TABLE OF CITATIONS

CASES	PAGE
Hudson v. Palmer, 468 U.S. 517 (1984)	8
National Private Truck Council, Inc. v. Oklahoma Tax Commission, 879 P.2d 137 (Okl. 1994), cert. granted, 63 U.S.L.W. 3500 (U.S. Jan. 6, 1995) (94-688)	10
Parratt v. Taylor, 451 U.S. 517 (1981)	8
Will v. Michigan, 491 U.S. 58 (1989)	5,9
STATUTES AND RULES	
42 U.S.C. §1983	1,3
Pa. Stat. Ann., Tit. 72	4
Sup. Ct. R. 35.3	2

STATEMENT OF QUESTION PRESENTED

Whether a party challenging in state court a state tax as depriving him of property without due process pursuant to 42 U.S.C. §1983 must exhaust administrative remedies available to contest the tax and recover the property as a requisite to bringing and maintaining the §1983 claim.

LIST OF PARTIES

The petitioners are Kim Verrichia and Nan Smolow. The respondents are the Pennsylvania Department of Revenue, its Secretary and its Deputy Secretary for Fiscal Policy and Analysis. The current Secretary is Robert Judge, who should be substituted for former Secretaries Barton Fields and James Schiner. See Sup. Ct. R. 35.3. Deputy Secretary Karl M. Ross has left Commonwealth employment and his position is now vacant.

STATEMENT OF THE CASE

1. This is a civil rights action brought in state court to compel the refund of state sales taxes. Petitioners challenged the Pennsylvania Department of Revenue's policy of calculating sales tax on the full purchase price of an automobile without taking into account manufacturers' rebates which effectively reduced the purchase price. After the Department changed its policy in their favor, petitioners brought this action pursuant to 42 U.S.C. §1983, claiming that the Department's former policy had deprived them of their property without due process of law.

2. The case was brought as a class action in the Court of Common Pleas of Bucks County, Pennsylvania. After the trial court had certified a class of taxpayers, but before any hearing had been

held on the merits, the petitioners moved for leave to discontinue the litigation, declared themselves prevailing parties, and requested $771,000 in attorneys fees and costs. The trial court granted their request in all respects and also ordered the Commonwealth to pay tax refunds to all class members. Pet. App. 35a - 45a.

3. On appeal, a three-judge panel of the Commonwealth Court of Pennsylvania reversed, on two separate and independent grounds. The two judges of the majority held first, that the Pennsylvania Tax Code, Pa. Stat. Ann., Tit. 72, ¶¶7253-7255 (Purdon 1990), provides a full opportunity for aggrieved taxpayers to challenge a tax before an administrative board, with a de novo review in state court, and that the availability of this procedure precluded petitioners' procedural due process claim. Pet. App. 12a-14a.

Second, the Commonwealth Court discussed what it called the respondents' "most persuasive" argument, Pet. App. 14a: that this action -- to compel the Commonwealth and its officers to refund state taxes -- fell squarely within the class of cases governed by this Court's holding in Will v. Michigan, 491 U.S. 58 (1989). The Commonwealth Court agreed, and held that on this ground, too, the petitioners' claim was precluded. Pet. App. 14a-18a.

The third judge, concurring in the judgment, would have reversed the trial court's award of attorneys fees on the ground that the petitioners had not prevailed on any significant issue. Pet. App. 21a-31a.

4. Petitioners then sought discretionary review in the Pennsylvania Supreme Court only on the issue of whether

administrative remedies must be exhausted prior to bringing a Section 1983 action relating to tax refunds. The Supreme Court denied their petition, Pet. App. 1a-2a, and the petition to this Court followed.

REASONS FOR DENYING THE WRIT

The case presents no important issues

This case presents neither the broad issue framed by the petition nor any other important or unsettled question to justify this Court's exercise of review. In addition, the unique and tenuous aspects of the trial court's judgment, which petitioners here seek to have this Court reinstate, make this case singularly inappropriate for review by writ of certiorari.

1. Petitioners' assertion that the Commonwealth Court announced a sweeping rule that civil rights plaintiffs suing in state court under Section 1983 must first exhaust administrative remedies is not correct. While the Commonwealth Court did unartfully couch its discussion in terms of exhaustion, its holding -- that the availability of adequate administrative

remedies forecloses a procedural due process claim -- is both correct and unremarkable. The Commonwealth Court understood the respondents to argue that "no claim can be maintained for deprivation of property without due process, i.e., a §1983 action, if a plain and adequate administrative remedy exists to recover the property." Pet. App. 12a. In accepting this argument and holding that "[petitioners] had an adequate administrative remedy. . . which precludes their filing of or maintaining a §1983 cause of action," Pet. App. 14a, the Commonwealth Court was squarely in accord with this Court's procedural due process decisions. See, e.g., Hudson v. Palmer, 468 U.S. 517 (1984); Parratt v. Taylor, 451 U.S. 517 (1981).

Further, the Commonwealth Court's straightforward and uncontroversial

application of Will v. Michigan, 471 U.S. 58 (1989) provides an adequate, independent basis for affirmance which should foreclose further review. The court held that Will barred a suit for damages brought against state officials in their official capacities.

2. The unique procedural aspects of this case also counsel against granting the petition. First, the policy petitioners challenged had already been changed before they filed their lawsuit. Pet. App. 5a. In addition, the merits of their claim were never litigated before the trial court. Having obtained no more than an order granting class certification and directing notice to the class, petitioners moved the court to permit them to discontinue their case and to award them in excess of $700,000.00 in attorneys fees and costs. It is the order granting

this motion that Commonwealth Court reversed. The unusual procedural posture alone would have justified reversal, and makes review by this Court inappropriate.

3. This Court's recent grant of certiorari in National Private Truck Council, Inc. v. Oklahoma Tax Commission, 879 P.2d 137 (Okl. 1994), cert. granted, 63 U.S.L.W. 3500 (U.S. Jan. 6, 1995) (94-688) does not justify a similar grant in this case, nor does it require that this case be held pending resolution of that case. The Court granted certiorari in National Private Truck to consider the propriety of a state court's refusal to entertain a Section 1983 claim alleging a retaliatory tax under the Commerce Clause upon principles of comity and federalism. 63 U.S.L.W. 3429. That case presents different reasons for the grant of review than this one in terms of the nature of

the claim asserted, commerce clause claim versus deprivation of property without due process; the existence of alternative reasons supporting the state court's judgment; and the uniquely different procedural postures of the cases and thus, would not have any effect on the propriety of the Commonwealth Court's decision in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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DATE: February 17, 1995